UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PAIN RELIEF CENTERS, P.A.

and Case 10–CA–266324

KRISANDRA MARIE EDWARDS

Joel R. White, Esq., for the General Counsel.
David P. Phippen, Esq. (*Constangy, Brooks, Smith & Prophete, LLP*), of Fairfax, Virginia, and *Matthew K. Rodgers, Esq.* (*Law Offices of Matthew K. Rogers, PLLC*), of Hickory, North Carolina, for the Respondent.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This is the second unfair labor practice case involving Pain Relief Centers, P.A. (the Respondent) and Charging Party Krisandra Marie Edwards. Back in August 2020, the General Counsel issued a complaint against the Respondent alleging that the company unlawfully discharged Edwards and four other employees for their protected concerted activity (*Pain Relief Centers I*). The Respondent asserted a number of defenses to the allegation. The defenses included that the five employees were not discharged, but instead resigned. They included that Edwards' conduct on the day she quit breached an employment contract she had with the Respondent. They included that Edwards was a statutory supervisor who was not protected by the National Labor Relations Act (the Act).

Less than 2 weeks after the General Counsel's complaint issued and prior to a hearing before an administrative law judge, the Respondent filed a lawsuit in North Carolina state court against Edwards and the other four discriminatees. Among other things, the lawsuit alleged that the five employees defamed the Respondent by providing false statements to the National Labor Relations Board (the Board or NLRB). To support those claims, the Respondent's lawsuit allegations included all of the defenses it asserted to the General Counsel's complaint in *Pain*

Relief Centers I. Shortly after filing the lawsuit and again prior to an NLRB hearing, the Respondent issued discovery requests in the state court lawsuit to the five employees. The Respondent sought all documents the employees submitted to the General Counsel during the investigation of the charges in *Pain Relief Centers I*. It sought all documents the employees planned to introduce into evidence at the NLRB hearing. It sought the identities of all persons who assisted the employees with the NLRB case and the identities of potential witnesses in support of their NLRB case. It sought all of the facts the employees relied upon to support a finding that the Respondent violated the Act.

Not long thereafter, the General Counsel issued the complaint in this case *(Pain Relief Centers II*), alleging the Respondent's filing and pursuit of the state court lawsuit violated the Act in numerous ways. The complaint alleges that certain lawsuit allegations and the discovery requests are preempted by the Act. The complaint also alleges that other allegations are baseless and retaliatory under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

The Respondent's attempt to utilize the North Carolina court system to nullify the Board's jurisdiction and its adjudicatory process strikes at the very heart of the Act and is both preempted and unlawful. The mere filing of the lawsuit chills employees, including the five here, from filing charges with and providing evidence to the Board in the future. Because the Board cannot initiate a case without a charge being filed, the Respondent's state court lawsuit weakens the Board's ability to fulfill its statutory mandate to enforce the Act. Beyond that unlawful conduct, I conclude in *Pain Relief Centers II* that most, but not all, of the General Counsel's other complaint allegations are meritorious.

On September 21, 2021, I heard this case via videoconferencing. On October 26, 2021, the General Counsel and the Respondent filed posthearing briefs, which I have read and considered. On the entire record, I make the following findings of fact and conclusions of law.[1]

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[1] On April 9, 2021, the General Counsel, through the Regional Director for Region 10 of the Board, issued a complaint against the Respondent in Case 10–CA–266324. The complaint was premised upon an unfair labor practice charge filed by Krisandra Marie Edwards on September 18, 2020, and an amended charge filed by Edwards on December 2, 2020. The General Counsel's complaint was amended on April 27, 2021; August 12, 2021; August 19, 2021; and, absent objection, at the hearing in this case on September 21, 2021. The Respondent filed answers to the first and third complaints on May 11, 2021, and September 2, 2021, denying the substantive allegations.

The Respondent argues that the General Counsel's complaint was invalidly prosecuted because the removal of prior General Counsel Peter Robb was unlawful. The Board already has declined to assert jurisdiction over this legal question. See *National Assn. of Broadcast Employees & Technicians--the Broadcasting & Cable Television Workers Sector of the CWA Local 51*, 370 NLRB No. 114, slip op. at 2 (2021). Therefore, I likewise decline to address the issue.

In its answer to the original complaint and prior to the hearing, the Respondent also filed motions to dismiss and for summary judgment with the Regional Director. Sec. 102.24 of the Board's Rules and Regulations requires such prehearing motions to be filed with the Board. Subsequent to the filing, the Respondent changed lead counsel, who advised me in a prehearing conference call that the Respondent was abandoning those motions. The motions never were filed with the Board.

FINDINGS OF FACT[2]

The Respondent provides interventional pain and addiction management to patients from medical offices in Conover and Salisbury, North Carolina.[3] Dr. Hans Hansen is the Respondent's owner and practicing physician. Sharese Cromer is its practice/office manager. The Respondent employed Charging Party Krisandra Edwards from about July 2018 to May 14, 2020, as a nurse practitioner. In May 2020, Edwards worked with four medical assistants: Miranda Cox, Yesenia Ramirez-Zavala, Erin Stiltner, and Amber Whitlock.

ALLEGED UNFAIR LABOR PRACTICES

A. The Administrative Law Judge's Decision in Pain Relief Centers I

On August 19, 2020, the General Counsel issued a consolidated complaint against the Respondent in *Pain Relief Centers I*, Case 10–CA–260563, premised upon charges filed by Edwards and the other four employees. The complaint principally alleged that, on May 14, 2020, those employees engaged in protected concerted activity by raising concerns about the Respondent's treatment of employees and then jointly walking out of work in protest of that treatment. The complaint further alleged that, on that same date, the Respondent discharged all five employees for engaging in that protected activity in violation of Section 8(a)(1) of the Act.

On February 22–24 and March 2, 2021, Administrative Law Judge David Goldman heard the *Pain Relief Centers I* case. On May 13, 2021, Judge Goldman issued his decision. Finding merit to the General Counsel's complaint, he concluded that, on May 14, 2020, the five employees, including Edwards, engaged in protected concerted activity when they walked out of work together. He found that the walk out was to protest the Respondent's suspension of Edwards that day and the group's complaints about Office Manager Cromer's performance

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[2] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was unworthy of belief. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact.

In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. My findings and conclusions are based on my review and consideration of the entire record.

[3] In its answer to the third amended complaint, the Respondent admitted, and I so find, that the Board has jurisdiction in this case and the Respondent is a Sec. 2(2), (6), and (7) employer.

which had been brought to her attention in the days preceding the walkout. He also found that the Respondent discharged the five employees for that protected activity.

Judge Goldman also rejected a number of the Respondent's affirmative defenses. First, he rejected the Respondent's contention that the employees were not discharged but instead quit. Second, he rejected the Respondent's claim that the employees' walkout violated the company's work rules and state nursing and medical board policies. Third, he rejected the defense that Edwards was a Section 2(11) supervisor who was excluded from the protections of the Act. Fourth, he rejected the Respondent's claim that Edwards had breached a "Nurse Practitioner Employment Contract" she had with the company, concluding that the Respondent failed to establish that such a contract existed. Finally, Judge Goldman rejected the Respondent's attempts to offer evidence concerning the five discriminatees' actions after they walked out of the company's facility on May 14.

On July 28, 2021, the Respondent filed exceptions to Judge Goldman's decision. Those exceptions are pending at the Board.

B. The Respondent's State Court Lawsuit Against the Discriminatees in Pain Relief Centers I

On September 1, 2020, or just short of 2 weeks after the General Counsel issued the complaint in *Pain Relief Centers I*, the Respondent, Hansen, and Cromer (the plaintiffs) filed an original complaint (the state court lawsuit or lawsuit) with a demand for a jury trial against Edwards and the other four charging parties (the defendants) in *Pain Relief Centers I*.[4] The plaintiffs filed the lawsuit in the North Carolina state superior court in Catawba county. They filed it prior to the NLRB hearing before Judge Goldman.

The lawsuit alleged claims for defamation (libel and slander), breach of contract, and conspiracy to defame (libel and slander) and to breach contracts.[5]

1. Factual allegations in the state court lawsuit

The plaintiffs alleged numerous facts in the lawsuit to support their claims. Among them was that, on May 14, the defendants quit their jobs. Specifically, the lawsuit alleged that Edwards told Cromer that she quit and was taking the staff with her. It further alleged that Edwards thereafter met up with the four medical assistants, they all stated that they were quitting, and then they walked out. It also claimed that, prior to the walkout, Hansen told Edwards she could take the rest of the day off, not that she was suspended. Next, the lawsuit alleged that Edwards' breached a "Nurse Practitioner Employment Contract" she had with the Respondent by not performing her medical provider duties as set forth in a "Collaborative

[4] All dates hereinafter are in 2020 unless otherwise specified.

[5] GC Exh. 2. The Respondent amended its state court lawsuit on November 13, 2020, and the lawsuit allegations described herein are from that amended lawsuit. (GC Exh. 3.)

Practice Agreement" between her and the Respondent.[6] Finally, the lawsuit alleged that Edwards was responsible for supervising the other medical professionals, including the four medical assistants.[7]

2. The defamation allegations: False statements to the NLRB

In the defamation/libel claim, the plaintiffs alleged that defendants Edwards, Cox, and Ramirez-Zavala submitted complaints and/or affidavits to the Board with defamatory statements, including falsely representing that they were discharged. The plaintiffs also asserted that the defendants conspired to quit and then actually did so, but represented to other entities of North Carolina State government that they were discharged.[8]

For the defamation/slander claim, the plaintiffs alleged that "upon information and belief," Edwards and the other defendants made additional false statements concerning one or more plaintiffs similar to the ones previously alleged. The complaint did not state what the statements were or to whom they were made. The plaintiffs further claimed that they incurred "special damages, including without limitation, attorney's fees required to investigate, respond to and (defend) against NLRB claims made due to false and defamatory statements."[9]

3. The defamation allegations: Social media posts

In further support of the defamation/libel claim, the plaintiffs pointed to multiple postings on the job search website www.indeed.com that were made on May 15, the day after the employees' walkout. The postings were included as an exhibit to the lawsuit. The comments were posted in the "company reviews" section for the Respondent on the website. The first Indeed.com post was:

> Very poor management. Abundance of hostility towards staff. Supervising physician (also the owner) didn't have my back and

[6] Cromer, the Respondent's office/practice manager, testified that the Collaborative Practice Agreement is required by North Carolina for a nurse practitioner, because that position requires a supervising physician, in this case Hansen. (Tr. 61–62; R. Exh. 6.) Beyond the Collaborative Practice Agreement, the Respondent contends in this case that Edwards had a contract with it. To establish that fact, the Respondent introduced a text message in which Edwards stated to Cromer on May 15 "Please have [a] copy of my contract on Monday ready for me." (R. Exh. 4, p. 3.) In addition, and in response to leading questions, Cromer testified that Edwards had a contract. (Tr. 56.) However, she did not identify the alleged contract or offer any additional testimony about the contract's terms. The Respondent also did not introduce any document to support Cromer's testimony. If Cromer was referring to Edwards' alleged Nurse Practitioner Employment Agreement, Judge Goldman ruled in *Pain Relief Centers I* that the contract did not exist. I likewise find that the Respondent's evidence in this case is insufficient to establish the existence of a contract.

[7] GC Exh. 3, state court lawsuit pars. 23, 24, 25, 28, 35–49, and 52.

[8] GC Exh. 3, state court lawsuit pars. 62, 63, 64, and 66.

[9] GC Exh. 3, state court lawsuit pars. 70, 71, and 73.

> allows office management to yell at providers. The company goes thru staff like underwear. Beware!

The website attributed the comment to a "Nurse Practitioner (Former Employee)". The plaintiffs pled in the complaint that the post "must be attributed" to Edwards.[10]

The portion of the second Indeed.com post alleged in the lawsuit as defamatory was:

> RUN! RUN and do not look back! This practice is (run) by a maniac! She is a terrible manager and so are the practice owners!. . .When not ONE but FIVE employees are fired the same day you know there's a problem!

According to the website, the comment was posted by a "Medical Assistant (Former Employee)." The plaintiffs pled that the post "must (be) attributed to one of the five former employees, which one Plaintiff is uncertain (prior to discovery)." The plaintiffs further pled that the company "did not fire five employees on any day" and that one of the five employees "made the statement knowing that the employees quit on (their) own accord. . ."[11]

The portion of the third Indeed.com post alleged in the lawsuit as defamatory was:

> Absolutely nothing but drama and lies. The management is completely unprofessional. The management has no idea of what they are doing. . . No one has been there longer than 2–3 years except the owner obviously. . .Very hostile work environment.

According to the website, the comment was posted by "Medical (Former Employee)." The plaintiffs again pled that the post "must (be) attributed to one of the five former employees, which one Plaintiff is uncertain (prior to discovery)." In support of that allegation, the plaintiffs further pled that Edwards was part of the Respondent's "management" and the company had employees with job tenures longer than 3 years.[12]

For all of these social media posts, the plaintiffs alleged that the statements were not true and were maliciously made to impeach Hansen and Cromer in their trade or profession and/or otherwise to subject them to ridicule, contempt, or disgrace. The plaintiffs also claimed

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[10] GC Exh. 3, state court lawsuit par. 57 and exh. 3, p. 1.

[11] GC Exh. 3, state court lawsuit pars. 58 and 59 and exh. 3, p. 1.

[12] GC Exh. 3, state court lawsuit par. 60 and exh. 3, p. 2. Neither the General Counsel nor the Respondent called Edwards or any of the four medical assistants as witnesses in this case. Thus, no testimony was offered as to the identity of the Indeed.com posters or the circumstances involved in the posting of the comments.

they incurred special damages from these and other unidentified slanderous statements.[13] The only specific special damages that were pled were the aforementioned attorney's fees to defend against the General Counsel's complaint in *Pain Relief Centers I*.[14]

4. The breach of contract allegations

In support of the breach of contract claim in the lawsuit, the plaintiffs alleged that the defendants, including Edwards, breached one or more provisions of their employment agreements with the Respondent, including violations of provisions in the Respondent's employee handbooks. Neither the contractual nor the handbook provisions were identified. However, the complaint went on to allege specifically that Edwards breached the terms of her "Nurse Practitioner Employment Contract" by "soliciting, inducing and attempting to influence the four employees that Edwards supervised to terminate their relationship" with the Respondent. It also alleged that Edwards further breached that contract by not performing her duties in accordance with the "Collaborative Practice Agreement," which the contract required.[15]

5. The conspiracy to defame and to breach contracts allegations

In support of the conspiracy to defame and to breach contracts claims, the plaintiffs alleged in their lawsuit that the defendants conspired to file false claims with the NLRB and a North Carolina government agency. The claims also alleged the defendants left the Respondent's practice together without telling the Respondent in order to cripple its business. It also alleged that certain Facebook posts made by the defendants showed "a complete disregard for their jobs and patient care responsibilities during a pandemic." The claims alleged that the posts established that the defendants conspired to breach their contracts in a malicious manner and then maliciously defame the Respondent and its owners, causing the Respondent to incur special damages.[16]

The Facebook posts were attached to the complaint. The first post, from Edwards on the day of the walkout, contained a group selfie identifying the individuals as Edwards, Cox, and Stiltner and two other unidentified individuals, presumably the remaining two defendants. The

[13] The second claim for relief in the state court lawsuit was for slander. The lawsuit alleged that "[u]pon information and belief, Defendants have made false statements of and concerning one or more Plaintiffs similar to the statements that were published" on Indeed.com, Facebook, and to the NLRB. GC Exh. 3, state court lawsuit par. 70. No specific statements were included.

[14] GC Exh. 3, state court lawsuit pars. 59, 61, 65, 67, 71, 73. As to special damages, Cromer testified generally in this case that, since the Indeed.com comments, the Respondent has had a very difficult time hiring new employees because no one was applying. She said she had one or two people apply despite having ads out for months. Cromer did not provide any additional details. (Tr. 48; state court lawsuit complaint par. 72.) She also did not identify any additional special damages.

[15] GC Exh. 3, state court lawsuit pars. 85, 90, 92.

[16] GC Exh. 3, state court lawsuit pars. 96–99.

photo included the comment: "From the famous words of Shania Twain. . . "Let's Go Girls!"[17] In the second Facebook chain, Whitlock posted "We care about you Krisandra Settlemeyre Edwards" to which Cox responded, "I had plenty to say. . . but I chose to stay in my character as we see others simply showed their true colors." Cox also posted a quote from "Dave Willis" stating: "Show respect even to people who don't deserve it; not as a reflection of their character, but as a reflection of yours." Finally, Cox posted "We got'chu! The only people I owe my loyalty to are the ones who never made me question theirs." Ramirez-Zavala later posted "Come on girls! We're rolling out." The comment was followed by a laughter emoji. None of the comments mentioned the defendants.[18]

C. The Respondent's Discovery Requests to Edwards and the Other Defendants

On September 15, or about 2 weeks after the plaintiffs filed the state court lawsuit, the Respondent served nearly identical discovery requests upon Edwards and the other four defendants in that lawsuit. The requests sought the production of documents as well as answers to interrogatories. The Respondent sought this discovery about a month after the General Counsel issued the complaint in *Pain Relief Centers I* and again prior to an NLRB hearing on that complaint.[19]

In the document requests, the Respondent asked the defendants to provide all documents they submitted to the Board related to their unfair labor practice charges or the General Counsel's complaint in *Pain Relief Centers I*. The Respondent also asked for all documents that the defendants "may offer to introduce into evidence, or use as an exhibit for motion or hearing before the NLRB."

As to the interrogatories, the Respondent asked the defendants to "identify all persons, with sufficient specificity, for the issuance of a subpoena or notice of deposition with whom you discussed preparing, filing, and/or continuing the NLRB charges" and "the NLRB complaint." The interrogatories also asked the defendants to identify "all facts you alleged support a

[17] In the Indeed.com post, two digital pictures also are included and appear to be laughing while crying emojis. The line "Let's Go Girls" apparently is in reference to the opening lyrics of Shania Twain's song "Man! I Feel Like a Woman!" The song appeared on her third studio album, "Come on Over," and was released in 1999. Twain wrote the song's lyrics as an expression of female empowerment. The song rose to number 4 on Billboard's Hot Country Singles chart and won Twain her second Grammy Award for Best Female Country Vocal Performance. See https://www.shaniatwain.com/music and https://en.wikipedia.org/wiki/Man!_I_Feel_Like_a_Woman!#Composition_and_lyrics. Given Twain's popularity and long, successful career, these facts may very well be generally known in the State of North Carolina, in which case I could take judicial notice of them. Nonetheless, I decline to do so as it is unnecessary to resolving the legal issues presented in this case. The "Let's Go Girls" language obviously referenced the employees' walkout the prior day.

[18] GC Exh. 3, state court lawsuit exhs. 1 and 2. The posts in exh. 2 are undated but, based upon the content of the comments, appear to have been made shortly after the employees' May 14 walkout.

[19] GC Exhs. 4–8, pars. 11 and 17 of the document requests to the five defendants and pars. 26–29 (Edwards) or 20–23 (remaining defendants) of the interrogatories.

violation of the National Labor Relations Act." Finally, the Respondent asked the defendants to "identify all persons you have contacted regarding and/or asking if such persons would be a witness relating to the charge[s] you asserted with NLRB."

ANALYSIS

I. IS IT PROPER TO RELY UPON JUDGE GOLDMAN'S FINDINGS IN *PAIN RELIEF CENTERS I* IN THIS CASE?

Prior to the hearing in this case, counsel advised me of Judge Goldman's decision in *Pain Relief Centers I* and their disagreement as to whether I should rely on Judge Goldman's findings in this case. I advised counsel that I would hear oral argument at the start of the hearing on this legal issue and gave them that opportunity.[20] The General Counsel argued that the Respondent should not get a second bite at the apple and an opportunity to relitigate issues already addressed in *Pain Relief Centers I*. The General Counsel requested that I bar the Respondent from doing so. The Respondent argued that my reliance upon Judge Goldman's decision would be prejudicial to it and violate due process for multiple reasons.

Following the parties' oral arguments, I orally granted the General Counsel's request, which I treated as a motion, to bar the Respondent from relitigating the factual and legal findings in *Pain Relief Centers I*, including the discharges of the five discriminatees and the supervisory status of Edwards. I also declined to enter the transcript and exhibits from *Pain Relief Centers I* to the record in this case and declined the Respondent's request that I stay this case. Over the Respondent's objection, I also took judicial notice of Judge Goldman's decision in *Pain Relief Centers I*. I reaffirm those holdings here.

Board administrative law judges (ALJs) have discretion to rely on the factual and legal findings of another ALJ in a prior case, even if that case is pending at the Board on exceptions. See, e.g., *Voith Industrial Services, Inc.*, 363 NLRB No. 109, slip op. at 1 fn. 2 (2016) (judge properly barred respondent from relitigating the lawfulness of an employee's suspension, which had been litigated in an earlier case then pending at the Board on exceptions); *Detroit Newspapers Agency*, 326 NLRB 782, 782 fn. 3 (1998) (same as to prior ruling that strike was an unfair labor practice strike). If the Board ultimately affirms the ALJ's findings in the prior case, then taking judicial notice of the prior ALJ decision and relying on the findings therein in the subsequent case is proper. *Registry of Interpreters for the Deaf, Inc.*, 370 NLRB No. 18, slip op. at 4 fn. 11 (2020); *International Longshore and Warehouse Union, AFL–CIO* et al. *(ICTSI Oregon, Inc.)*,

[20] Tr. 7–19.

363 NLRB No. 47, slip op. at 1 fn. 3 (2015).[21]

The reasons for relying upon a prior ALJ's findings are readily apparent. First, doing so enhances judicial efficiency by not having a second trial over the same facts and legal issues. Second, it eliminates the possibility of two judges coming to different conclusions. This is critical when it comes to credibility determinations from the first case. Under *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), the Board traditionally has shown great deference to the credibility determination of a trial judge. Imagine a factual finding in the first case which was dependent on such a determination, especially one based upon witness demeanor. If a party was allowed to relitigate those facts in a subsequent case, the two judges might reach a different credibility resolution. That would leave the Board with the challenge of having to pick between the two. Finally, allowing reliance on findings from the prior case ensures due process for all involved parties. In the first case, all parties are afforded the opportunity to present evidence in support of their legal positions. Preventing a party from, as the General Counsel put it, getting a second bite at the apple to retry previously litigated matters ensures due process to the party who won the first case. The losing party also is guaranteed due process by having the ability to file exceptions to the judge's decision in the first case with the Board.

All of these reasons are present here and support the conclusion that I should rely on Judge Goldman's findings. As to judicial efficiency, the trial in this case, absent relitigating issues, took roughly half a day. The first trial took 4 days to complete or eight times as long. Second, the Respondent was seeking to have me rule again on disputed facts and legal issues presented in the first case. The Respondent's answer in this case asserted as affirmative defenses that the five discriminatees did not engage in protected concerted activity. The answer also asserted that Charging Party Edwards is a Section 2(11) supervisor. Counsel for the Respondent made clear during oral argument that he wished for me to not only review the entire record of the first case but also to consider, based on that evidence, whether some of Judge Goldman's findings were erroneous. Finally, as to due process, the Respondent had the opportunity to present its evidence in the first trial. To the extent it believes some of Judge Goldman's rulings limiting its evidence presentation were incorrect, the Respondent has taken those issues up with the Board on exceptions. Due process does not require that it have a

[21] The Board itself has not relied upon an ALJ's findings when issuing a decision against the same Respondent, when those findings were pending at the Board on exceptions at the time the decision issued and relying on them was unnecessary to the outcome. See *American Thread Co.*, 270 NLRB 526, 526 fn. 2 (1984) (although ALJ relied on animus finding in prior case, Board did not rely on the finding because the decision presently was before the Board on exceptions). Many years ago, the Board also affirmed without comment a judge's refusal to rely upon a prior judge's decision simply because it was not a final decision of the Board. See *Superior Container, Inc.*, 276 NLRB 532 (1985). However, the current state of Board law on this issue appears to be that a judge has the discretion to rely upon an earlier judge's findings, subject to those findings later being affirmed by the Board. *Superior Container* likewise is consistent with the view that relying on a prior judge's findings is a matter of the judge's discretion.

second opportunity to litigate those issues before a different judge. Accordingly, I find it proper for me to rely on Judge Goldman's earlier findings.

The Respondent's oral arguments at the hearing do not warrant a different result. The Respondent contended that it could not determine with certainty how to present its defense in this case. However, once I ruled at the hearing that the Respondent was barred from relitigating issues, it knew that the factual and legal findings from the first case applied in the second and was aware of the evidentiary limitations imposed on its defense.

Next, the additional litigation expenses incurred by the Respondent here do not warrant a prolonged stay of this case and the resulting delay in its resolution. Moreover, if the Board sustains its exceptions in *Pain Relief Centers I* and concludes that the employees did not engage in protected concerted activity or that Edwards is a Section 2(11) supervisor, those holdings will become the law of the case and apply here without the need for further litigation.

Third, the General Counsel was not required to consolidate *Pain Relief Centers I* and *II* for hearing, because the two cases involve different conduct. See, e.g., *Napleton Cadillac of Libertyville*, 369 NLRB No. 56, slip op. at 10 (2020); *Affinity Medical Center*, 364 NLRB No. 66 (2016).

Finally, the Respondent has not been prejudiced by any of my additional rulings or actions. No prejudice has resulted from my reading of Judge Goldman's decision or the Respondent's exceptions prior to the hearing in this case. In a prehearing status call, counsel raised their disagreement about whether I should rely upon Judge Goldman's findings in this case. In order to properly evaluate that legal question, I had to read the decision and the Respondent's exceptions to understand their connection to this case. To address the Respondent's concern about witness credibility, I included in my oral ruling that I would not rely upon Judge Goldman's credibility resolutions, in whole or in part, when assessing the credibility of any witnesses in this case. I also do not find it proper to admit the entire record from *Pain Relief Centers I* in this case to, as the Respondent's counsel put it, "determine whether Judge Goldman had, in fact, correctly interpreted the record…"[22] Doing so would create the judicial inefficiency and potential for conflicting findings that should be avoided.

For all these reasons, the Respondent properly was barred from relitigating any of Judge Goldman's findings in *Pain Relief Centers I*, including that the five discriminatees engaged in protected concerted activity and they were discharged for it; the Respondent suspended Edwards prior to discharging her; Edwards did not have a "Nurse Practitioner Employment Contract" with the Respondent; and Edwards was not a Section 2(11) supervisor. I take judicial notice of Judge Goldman's decision and will rely on his findings in *Pain Relief Centers I* in

[22] Tr. 13.

assessing the General Counsel's complaint allegations in this case, subject to the Board subsequently affirming those findings.[23]

II. DOES THE NATIONAL LABOR RELATIONS ACT PREEMPT CERTAIN ALLEGATIONS IN THE RESPONDENT'S STATE COURT LAWSUIT?

The General Counsel's complaint alleges that the Respondent's filing of the North Carolina lawsuit violates Section 8(a)(1), because certain allegations in the lawsuit are preempted by the Act under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Loehmann's Plaza*, 305 NLRB 663 (1991). First, the General Counsel claims these allegations are preempted, because they interfere with the arguably protected right to file unfair labor practice (ULP) charges with the Board and to participate in the investigation and prosecution of those charges through Board administrative proceedings. In the alternative, the General Counsel argues that these allegations interfere with the actually protected right to engage in the same activities. Second, the General Counsel alleges that other allegations in the lawsuit interfere with the actually protected right of employees to concertedly walkout to protest their treatment at work.[24]

A. Garmin Preemption Framework

In *Garmon*, the Supreme Court held that "[w]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244. The Court further held preemption applies even when the activity that the state seeks to regulate is only "arguably" protected by Section 7 or prohibited by Section 8. Id. at 245. The Court subsequently held that, in determining whether a state cause of action is preempted, the critical inquiry is whether the controversy presented to the court is identical, or the same in a fundamental respect, to one that could have been presented to the Board. *Operating Engineers v. Jones*, 460 U.S. 669, 682–683 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202–203 (1978).

The Board applied the *Garmon* approach in *Loehmann's Plaza*, supra at 669–672. The Board concluded that a state court lawsuit seeking to enjoin peaceful union picketing or handbilling on private property was preempted. It also concluded that preemption occurred when the General Counsel issued an unfair labor practice complaint alleging the lawsuit was unlawful. The issuance of the complaint satisfied the *Garmon* preemption requirement that the conduct alleged to be unlawful in the state court action was arguably protected. Furthermore, a respondent's pursuit of the lawsuit following the General Counsel's issuance of the complaint violated Section 8(a)(1).

[23] Judge Goldman's decision is a public document available on the Board's official website at https://www.nlrb.gov/case/10-CA-260563.

[24] GC Exh. 1(k), complaint pars. 10 and 11.

The Supreme Court in *Garmon* set forth two exceptions to the general rule that lawsuits involving conduct arguably protected by the Act are preempted: activity that is "a merely peripheral concern" of the Act and activity that touches interests "deeply rooted in local feeling and responsibility." *Garmon*, supra at 243–244.

The Supreme Court recognized another *Garmon* exception in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The Court held that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the Act does not preempt a state defamation action if the complainant pleads and proves that the defamatory statements were made with malice and caused damages. The Court noted that the Board traditionally did not police propaganda used in elections, except under limited circumstances where a misrepresentation required setting aside a union election. As a result, a state's exercise of jurisdiction over a state law defamation claim was deemed a "merely peripheral concern" of the Act. In contrast, the state had "an overriding state interest" that was "so deeply rooted in local feeling and responsibility" to protect its residents from malicious libel. The Court further noted that a state court condemnation of defamatory statements on an individual's character "would not interfere with the Board's jurisdiction over the merits of the labor controversy."

B. The Respondent's Allegations in the State Court Lawsuit Regarding False Statements to the NLRB Are Preempted

In this case, the Respondent's defamation claims in the state court lawsuit are premised, in part, on the defendants allegedly providing false statements to the NLRB.

The Board addressed a strikingly similar situation in *Manno Electric, Inc.*, 321 NLRB 278, 295–299 (1996), enforced mem. per curiam, 127 F.3d 34 (5th Cir. 1997). In that case, a union filed an unfair labor practice charge against an employer alleging that it had committed numerous violations of the Act during a union organizing campaign. The alleged ULPs included discharging employees due to their union activity. After the charge was filed but prior to a Board hearing before an ALJ, the employer filed a state court lawsuit against the union and several of the discriminatees. The lawsuit claimed that the defendants had cooperatively conspired to injure the employer's business and to slander the employer and its owner. In particular, the lawsuit alleged that, at the behest of their union, the discriminatees maliciously provided false statements to the NLRB.

The Board concluded that the employer discharged employees for their union activity and that the state court lawsuit allegations regarding false statements to the NLRB were preempted under *Garmon*. Noting that the defendants had a protected right to furnish information to the NLRB, the Board found that the plaintiffs' lawsuit was an attempt to dissuade employees from seeking access to the Board. The lawsuit's filing sought to punish the defendants for appealing to the Board and frighten other employees from doing so. Thus, the plaintiffs' lawsuit interfered with, restrained, and coerced employees in the exercise of their Section 7 right to invoke the processes of the Board and violated Section 8(a)(1).

The facts in this case are on all fours with those in *Manno Electric* and warrant the same outcome. Like in *Manno*, the plaintiffs' amended lawsuit here repeatedly alleges that Edwards and the other four discriminatees in *Pain Relief Centers I* submitted untrue and defamatory statements to the Board. The principal one was that the Respondent discharged the five employees. By filing its lawsuit 2 weeks after the General Counsel issued the complaint in *Pain Relief Centers I* alleging the defendants' discharges were unlawful, the Respondent was attempting to punish Edwards and the other employees for invoking the Board's processes. As noted in *Manno*, the Supreme Court has stated that "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Permitting a charged party to file a state court lawsuit against employees because they filed charges with the Board would upend the Board's adjudicatory process and result in a severe chilling effect on individuals invoking that process. Without individuals invoking that process, enforcement of the Act is not possible because the Board cannot initiate a case on its own. Thus, those allegations in the Respondent's complaint are preempted by *Garmon* because they interfere with the actually protected right to file Board charges and provide evidence in support of those charges. Ibid; see also *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011); *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017, 1023–1025 (4th Cir. 1981), cert. denied 454 U.S. 994 (1981). Because the conduct is actually protected, none of the *Garmon* exceptions apply and state jurisdiction must yield as to those allegations.[25]

Accordingly, the Respondent's allegations in the state court lawsuit regarding false statements being made to the NLRB are *Garmon* preempted. The Respondent violated Section 8(a)(1) by filing and pursuing these allegations in the lawsuit.[26]

[25] In *Manno Electric,* the Board adopted the decision of the administrative law judge without further comment. The judge also found that the plaintiffs' depositions of the defendants likewise violated Sec. 8(a)(1). The Board adopted that conclusion. I further note that the judge appeared to have found that the lawsuit allegations therein were both *Garmon* preempted by federal law and had an illegal object. Footnote 5 in *Bill Johnson's* is worded in the disjunctive, meaning the Board can enjoin both types of lawsuits. I also acknowledge, and have considered, that the finding of a violation was reached despite the fact that the state court lawsuit alleged defamation (libel) and the *Linn* defamation exception to preemption had been in place for some 30 years. Neither the Board nor the judge discussed *Linn*.

[26] The General Counsel's third amended complaint only alleges that certain paragraphs in the legal claims of the Respondent's state court lawsuit are preempted, not the entire lawsuit or any of the alleged facts therein. As a result, I conclude that the specific state court lawsuit paragraphs that are preempted based upon this rationale are numbers 62, 70, 73, and 98. Those paragraphs conform to pars. 9(d), 9(h), 9(j), 9(p) and 10 in the General Counsel's complaint.

C. The Respondent's Allegations in the State Court Lawsuit Regarding Substantive Issues Resolved by Judge Goldman Are Preempted

The Respondent's lawsuit also is premised upon the alleged facts that the defendants quit their jobs; Edwards breached an employment contract she had with the Respondent; and Edwards was a Section 2(11) supervisor. The Respondent asserted all of these defenses at the NLRB hearing in *Pain Relief Centers I* and Judge Goldman rejected them.

Again, the Board faced a patently similar situation in *Webco Industries, Inc.*, 334 NLRB 608 (2001) (*WebCo I*) and 337 NLRB 361 (2001) (*Webco II)*. In *WebCo I*, the General Counsel issued a complaint against the employer alleging that it had unlawfully laid off multiple employees, including Eric Martin, due to their support of a union. The employer's defense to the allegation involving Martin was that he was barred from seeking relief from the Board. At the time of the layoff, the employer provided Martin with severance pay in exchange for his execution of an agreement releasing the employer from all existing claims and liabilities. The Board rejected that defense and found that the employer unlawfully laid off Martin.

About two months after the General Counsel's complaint issued in *WebCo I*, the employer filed a state court lawsuit against Martin alleging breach of contract. The employer relied upon the same severance agreement it utilized as a defense in the Board case. In *Webco II*, the Board concluded that the lawsuit was *Garmon* preempted at its inception. Martin's union activities and his attempt to invoke the Board's processes were both arguably and actually protected by Section 7. The employer's selection of Martin for layoff arguably was prohibited by Section 8. The employer's defense in the Board case was inextricably intertwined with that arguably/actually protected and arguably prohibited conduct. That defense also was central to both the Board and the state court cases. As a result, the lawsuit created a potential conflict between federal and state adjudications and potential interference by the state with national labor policy. Thus, the Board had exclusive jurisdiction to determine the legal effect of the severance agreement. Moreover, the state court claims did not involve matters that were "deeply rooted in local feeling and responsibility." Instead, the effect of the severance agreement on Martin's ability to seek relief under the Act was a matter solely of federal law. Thus, the lawsuit was preempted and violated Section 8(a)(1) and (4).

The *Webco* facts and outcome are controlling in this case. In *Pain Relief Centers I*, the General Counsel issued a complaint alleging that the Respondent unlawfully discharged five employees in violation of Section 8(a)(1). About two weeks later, the plaintiffs filed the state court lawsuit which alleged, to the contrary, that the employees quit. Judge Goldman has found that the Respondent unlawfully discharged the five discriminatees for their protected concerted activity of walking out of work to protest their working conditions. Thus, their conduct arguably is protected by Section 7. The discriminatees also filed charges with the Board and invoked the Board's processes, activity that is actually protected. The Respondent's discharge of the five employees arguably is prohibited by Section 8. The Respondent's asserted defenses in the NLRB case were that the employees quit; Edwards breached her employment

contract with the Respondent; and Edwards was a statutory supervisor unprotected by the Act. These are the identical claims that the plaintiffs are making in the lawsuit. Thus, the defenses are inextricably intertwined with arguably and actually protected activity and are central to both the Board and the state court lawsuit. In these circumstances, the Board must have exclusive jurisdiction to resolve the disputed issues. Allowing the lawsuit to proceed would risk conflicting adjudications and state interference with national labor policy. The question of whether the defendants engaged in protected concerted activity and were discharged for that activity is a matter solely of federal law.

The Respondent contends that, under *Linn*, its defamation claims (related to arguably protected activity) cannot be preempted because its lawsuit pleads that the defendants made false statements with malice and caused special damages. I find the facts in this case distinguishable and the *Linn* exception inapplicable. *Linn* involved defamatory statements allegedly made in leaflets during an organizing campaign. The Supreme Court found that the defamation allegations were not preempted, because the state's overriding interest in protecting its residents from malicious libel outweighed the Board's limited interest in policing election propaganda. Thus, allowing the state defamation lawsuit to proceed "would not interfere with the Board's jurisdiction over the merits of the labor controversy." Here, the scale tips in the exact opposite direction. The Respondent's lawsuit seeks to have a state court adjudicate the merits of its defenses in the NLRB case—and to arrive at different conclusions than Judge Goldman did. The desire to usurp the Board's jurisdiction over the merits of the labor dispute is obvious. The Board has a substantial interest in adjudicating the alleged unfair labor practices in *Pain Relief Centers I*. The alleged ULPs are not a "a merely peripheral concern" of the Act, nor "deeply rooted in local feelings and responsibility."[27]

As a result, I conclude that the Act preempts the Respondent's lawsuit allegations seeking to relitigate in state court the General Counsel's complaint allegations and its defenses in *Pain Relief Centers I*. Permitting it to do so interferes with the discriminatees' actually protected right to invoke and participate in the Board's processes, as well as their arguably

[27] Beyond that, it is worth noting at this juncture that the Respondent offered no evidence at the hearing in *Pain Relief Centers II* in support of its allegations that the discriminatees' alleged false statements to the NLRB were made with malice. As to special damages, the only evidence presented was Cromer's limited testimony that she had difficulty hiring anyone after the social media posts were made. The fact that Cromer had difficulty hiring could be for any number of reasons—including the COVID-19 pandemic. The Respondent presented no evidence establishing a direct causational relationship between its difficulty hiring employees and the defendants' statements.

protected right to concertedly walk out to protest their employer's treatment of them.[28] Preemption occurred from the date the General Counsel issued the complaint in *Pain Relief Centers I*. The allegations are preempted until if and when the Board determines, in the alternative, that the Respondent acted lawfully in *Pain Relief Centers I*. The Respondent violated Section 8(a)(1) by pursuing these allegations in the lawsuit.[29]

[28] As alleged in the General Counsel's third amended complaint, I conclude that state court lawsuit pars. 90 and 96 were preempted pursuant to this rationale (with paragraph 96 preemption limited to the claim that the discriminatees' walkout was unprotected, not with respect to the claims involving the discriminatees' subsequent social media posts which will be discussed later herein). Those paragraphs conform to pars. 9(l), 9(n), 10 and 11 of the General Counsel's complaint.

However, I also find that this rationale applies to state lawsuit paragraphs 63, 64, 66, and 92, conforming to complaint paragraphs 9(e), 9(f), 9(g), and 9(m). The General Counsel alleged these paragraphs were unlawful under a different legal theory. But each of these paragraphs include allegations premised upon the defendants lying about being discharged and instead having quit. They also include the claim that Edwards breached her nurse practitioner employment agreement. Judge Goldman addressed those defenses and rejected them in *Pain Relief Centers I*. The defenses are inextricably intertwined with arguably protected activity and are matters solely of federal law. Although the General Counsel did not advance this legal theory as to those paragraphs, I conclude it is appropriate to find a violation on this theory, because all the conditions for doing so are present here. See *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 1–2 (2018). The language of the complaint encompasses this legal theory because it already alleged that certain state court lawsuit paragraphs were preempted. The factual record is complete, as the parties here essentially relied upon documents, not witness testimony, to prove their cases. The law on *Garmon* preemption is well established, having been introduced by the Supreme Court in 1959 and the case having been cited in 95 subsequent Board decisions. Finally, the General Counsel's theory was that these allegations were baseless and retaliatory under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983). Although baseless and retaliatory lawsuits are different from preempted ones, both legal theories involve the question of whether the Board can enjoin state lawsuits.

Finally, I note that the General Counsel alleged that the discriminatees' walkout was actually, not arguably, protected based on Judge Goldman's decision. I conclude the walkout is arguably protected until such time that the Board affirms that ruling.

[29] I find further support for these legal conclusions from the Board's decision in *Federal Security, Inc.*, 359 NLRB 1 (2012). That decision is not binding precedent, as it was issued at a time when the composition of the Board included two persons whose appointments were later determined to be invalid. See *NLRB v. Noel* Canning, 573 U.S. 513 (2014). Nonetheless, I find the decision "instructive." See *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 377 fn. 2 (D.C. Cir. 2016).

The Respondent's conspiracy to defame and to breach contracts claims (with respect to Edwards' alleged nurse practitioner employment agreement) likewise are preempted, as they are contingent upon alleged unlawful acts which Judge Goldman found did not occur in *Pain Relief Centers I*. See *Mace v. Pyatt*, 203 N.C. App. 245, 251, 691 S.E.2d 81, 87 (2010) (in North Carolina, civil conspiracy claims require a showing that an individual committed an unlawful act); *Mason v. Health Management Associates, LLC*, 421 F. Supp. 3d 237, 248 (W.D.N.C. 2019) (in North Carolina, civil conspiracy claims really are actions for damages caused by unlawful acts in furtherance of the conspiracy and not for the conspiracy itself).

III. DOES THE ACT PREEMPT THE RESPONDENT'S DISCOVERY REQUESTS IN SUPPORT OF ITS STATE COURT LAWSUIT?

The General Counsel's complaint alleges that multiple discovery requests served by the Respondent on the five discriminatees in *Pain Relief Centers I* likewise are preempted by the Act and violated Section 8(a)(1).

In *Guess?, Inc.*, 339 NLRB 432 (2003), the Board set forth its test for determining whether a respondent's discovery requests were lawful.[30] First, the requests must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' confidentiality interests under Section 7 of the Act.

Assuming arguendo that the first two elements have been met, I conclude that the Respondent's discovery requests are unlawful under the third element. The Respondent's interest in obtaining the information does not outweigh the core Section 7 rights of the employees to maintain the confidentiality of the evidence provided to the General Counsel in support of the charges prior to the hearing.

The law is well settled that pretrial discovery is not available in Board proceedings. See, e.g., *Offshore Mariners United*, 338 NLRB 745, 746–747 (2002); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Neither the Constitution nor any statute requires it. *David R. Webb Co.*, 311 NLRB 1135, 1135–1136 (1993), citing *Kenrich Petrochemicals v. NLRB*, 893 F.2d 1468, 1484–1485 (3d Cir. 1990); *NLRB v. Washington Heights,* 897 F.2d 1238, 1245 (2d Cir. 1990). In fact, Section 102.118 of the Board's Rules and Regulations prohibits the disclosure of documents in the General Counsel's possession without the consent of the General Counsel.

The Board's policy is grounded in "the peculiar character of labor litigation," where "witnesses are especially likely to be inhibited by fear of the employer's…capacity for reprisal and harassment." *NLRB v. Robbins Tire*, supra at 240 (quoting *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976)). "Board witnesses and other persons with relevant information are typically employees of the company defending an unfair labor practice charge. The company's position of control over these persons' livelihoods mandates protection that is not usually necessary in ordinary litigation." *P.S.C. Resources Inc.* v. *NLRB*, 576 F.2d 380, 386–387 (1st Cir. 1978). The Supreme Court itself has cautioned that the possibility that a "change in the Board's prehearing discovery rules will have a chilling effect on the Board's sources cannot be ignored." *NLRB v. Robbins Tire*, supra at 241. Accordingly, witness lists and other investigative materials do not have to be provided to a party prior to an unfair labor practice hearing. *Beta Steel Corp.*, 326 NLRB 1267, 1267 fn. 3, 1267–1268 (1998).

[30] The discovery requests in that case were deposition questions, but no reason exists not to apply the same test to other types of discovery, such as document requests or interrogatories.

Given the Board's policy, the Respondent's employees had a critical interest in maintaining the confidentiality of the evidence they provided the General Counsel in support of their unfair labor practice charges. The Respondent's discovery requests sought all of that evidence prior to the hearing. It requested documents, the identities of potential witnesses, the identities of individuals who assisted the employees with the NLRB case, and all of the facts the employees were relying upon to support their charges. Permitting the Respondent to obtain pretrial discovery via a state court lawsuit would eviscerate the Board's ban on such discovery.

Allowing the Respondent's discovery requests also would open the door to the possibility of intimidation of potential witnesses. The Board has the authority to protect employees who participate in its processes and an affirmative duty to exercise that authority to its outermost limits. *Newland Knitting Mills*, 165 NLRB 788, 795 (1967); *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679, 681 (1964). Doing so upholds the integrity of the Board's ability to enforce the Act. *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 15 (2020). Any conduct on the part of a party to a Board proceeding which interferes with, or prevents the Board from carrying out, this responsibility is an abuse of Board processes that independently violates Section 8(a)(1). *Duralite Co., Inc.*, 128 NLRB 648, 651–652 (1960). The right of employees to access the Board's processes free from intimidation is of the utmost importance. Absent that right, the willingness of employees to participate in Board proceedings, and specifically to provide needed evidence to the Board, would be substantially reduced.

In contrast, the Respondent's interest in obtaining this information simply is not as weighty. First, the requests essentially sought the discriminatees' entire NLRB evidentiary case. They were so broad in scope without any focus on the defamation and breach of contract complaint allegations in the Respondent's lawsuit. In those circumstances, the Respondent's need for the answers does not outweigh the employees' critical confidentiality interests. *Guess, Inc.*, supra at 435. Moreover, the Respondent had the ability to obtain all of the information it sought through the discovery requests at the NLRB hearing in *Pain Relief Centers I*. At that hearing, the General Counsel presented all the facts supporting the charge allegations. The Respondent obtained the identities of witnesses testifying about the allegations. The Respondent had the opportunity to question those witnesses and could have inquired as to other individuals with information relevant to the allegations.

Accordingly, the Respondent's discovery requests are preempted by federal law and violated Section 8(a)(1). *Guess?, Inc.*, supra at 435 fn. 10 (where the importance of Section 7 rights that would be compromised by a discovery request outweighs the interests that would be served by the request, the discovery is preempted by the Act.), citing *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 738 fn. 5 (1983).[31]

[31] Having found that the discovery requests are preempted, the Respondent's argument that the requests were permissible under North Carolina's Rules of Civil Procedure is meritless.

IV. ARE ALLEGATIONS IN THE RESPONDENT'S LAWSUIT BASELESS AND RETALIATORY UNDER *BILL JOHNSON'S RESTAURANTS*?

The General Counsel's complaint alleges that numerous allegations in the Respondent's lawsuit violate Section 8(a)(1) under the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, supra at 744, because they are baseless and retaliatory. The allegations in question involve two categories: the allegedly defamatory social media posts attributed to the discriminatees and the Respondent's contention that the discriminatees breached their employment contracts.

A. Bill Johnson's Restaurants Legal Framework

The filing and prosecution of a lawsuit which lacks a reasonable basis in fact or law, with the intent of retaliating for the exercise of rights protected by Section 7, violates Section 8(a)(1). Ibid. However, a reasonably based lawsuit, whether ongoing or completed, does not violate the Act, regardless of the motive for filing it. *BE&K Construction Co.*, 351 NLRB 451 (2007).

A lawsuit lacks a reasonable basis, or is objectively baseless, if no reasonable litigant could realistically expect success on the merits. *BE&K II*, supra at 457 (quoting *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993)). To demonstrate a lack of reasonable basis at the complaint stage, the General Counsel must prove that the plaintiff did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action. Moreover, a pending state court lawsuit is baseless where no genuine issues of material fact or law exist. *Can-Am Plumbing, Inc.*, 335 NLRB 1217, 1220 (2001). However, if genuine issues of fact or law are present, a determination that the lawsuit is baseless cannot be made until the state court litigation has been concluded and the Board must stay its proceedings until that time. Ibid.

To determine whether a retaliatory motive exists, relevant factors include whether the lawsuit was filed in response to protected concerted activity; evidence of prior animus towards protected rights; the lawsuit's baselessness; and a claim for punitive damages. *Atelier Condominium*, 361 NLRB 966, 970 (2014). Circumstantial evidence may establish a retaliatory motive, making relevant the surrounding circumstances to the lawsuit's filing. Ibid.

B. North Carolina Defamation Law

In North Carolina, publications or statements which are susceptible of but one meaning, when considered alone without innuendo, colloquium, or explanatory circumstances, and that tend to "disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided" are defamatory per se. *Flake v. Greensboro News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938). If the words are not injurious as a matter of general acceptance, but are only injurious in consequence of extrinsic facts, the words are only

actionable per quod. *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 467–468 (1955). To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed. *Morrow v. Kings Dept. Stores, Inc.*, 57 N.C.App. 13, 20, 290 S.E.2d 732, 736, disc. rev. denied, 306 N.C. 385, 294 S.E.2d 210 (1982). Libel actions involve written publications while slander actions involve oral communications. *Raymond U v. Duke University*, 91 N.C.App. 171, 181–182, 371 S.E.2d 701, 708–709 (1988).

In North Carolina, "[i]t is well settled that false words imputing to a merchant or businessman conduct derogatory to his character and standing as a businessman and tending to prejudice him in his business are actionable, and words so uttered may be actionable per se." *Badame v. Lampke*, supra at 468. The North Carolina Supreme Court has explained that in order to be actionable without proof of special damage, the false words "(1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business." Ibid. (citations omitted).

There are "constitutional limits on the *type* of speech" subject to a defamation action. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990). If a statement "cannot 'reasonably [be] interpreted as stating actual facts' about an individual[,]" it cannot be the subject of a defamation suit. Id. at 20 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). Rhetorical hyperbole and expressions of opinion not asserting provable facts are protected speech. Ibid.

C. The Allegations Involving Social Media Posts

In the first claim of its lawsuit, the Respondent alleged that the defendants' posts on social media constituted libel per se and libel per quod. To reiterate, the specific statements alleged as defamatory from Indeed.com are:

- "Very poor management. Abundance of hostility towards staff. Supervising physician (also owner)…..[sic] allows office management to yell at providers. The company goes thru staff like underwear."

- "RUN! RUN and do not look back! This practice is ran [sic] by a maniac! She is a terrible manager and so are the practices owners!....[sic] When not ONE but FIVE employees are fired the same day you know there is a problem!"

- "Absolutely nothing but drama and lies. The management is completely unprofessional. The management has no idea of what they are doing…. No one has been there longer than 2-3 years except the owner obviously…. Very hostile work environment…."

As to the Facebook posts, the Respondent did not allege in its lawsuit which specific statements therein it was relying upon to establish defamation. As previously noted, the defendants stated repeatedly "let's go girls" and made other, generalized comments regarding their good character and loyalty when compared to other, unidentified persons who were not worthy of respect. The Respondent alleges that both sets of posts tended to impeach the plaintiffs in their trade or profession, as well as subject them to ridicule, contempt, or disgrace. The Respondent also pled that the posts caused it special damages, including reducing responses to its employment advertisements and reducing its overall revenue. The Respondent sought damages, including punitive damages, in excess of $30,000.

Before substantively analyzing whether the Respondent's lawsuit allegations are baseless under *Bill Johnson's Restaurants*, a review of what is and is not my job in that regard will be useful. The Supreme Court made clear in *Bill Johnson's Restaurants* that an administrative law judge is not to evaluate the legal merits of state lawsuit complaint allegations. Rather, the judge must determine if genuine state-law legal questions are presented by the lawsuit allegations. Such questions are those that are not plainly foreclosed as a matter of law or otherwise frivolous. The judge must not decide the substance of those legal questions. Thus, the only issue before me is whether the Respondent's defamation allegations concerning the social media posts raise a genuine state-law legal question or instead are plainly foreclosed as a matter of North Carolina law. If the latter, the allegations are baseless.

In *Mason v. Health Management Associates*, 421 F.Supp.3d 237, 247–248 (W.D.N.C. 2019), plaintiffs brought a defamation action against defendants for allegedly false statements concerning why the defendants had terminated their contract with the plaintiffs to provide emergency room (ER) services to two hospitals. The complaint alleged that defendants stated they terminated the contract because the plaintiffs' ER physicians did not want to practice quality medicine, refused to use the defendants' quality program, and had low patient satisfaction scores. The court denied the defendants' Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the defamation claim. The court found that the alleged statements, if true, impeached the plaintiffs in their trade, business or profession by implying that they were performing unsatisfactory work and were not interested in giving quality medical treatment. The court further found that the statements were of fact, not opinion. Accordingly, the allegations stated a claim for defamation under North Carolina law.

In so concluding, the trial court relied upon the decision in *Eli Research, Inc. v. United Communications Group, LLC*, 312 F. Supp. 2d 748, 762–763 (M.D.N.C. 2004). In that case, the plaintiffs brought a multiple count complaint against the defendants, including defamation, after several of the plaintiffs' editors resigned and went to work for the defendant corporation. The complaint alleged that, at trade shows and other venues, the defendants told customers, editors, and others that the plaintiff corporation was "mismanaging its company," that it "engaged in unethical and morally repugnant dealings with its employees and contractors," that its substantive work was "shoddy and faulty," and that the defendant corporation was "going bankrupt." The court denied the defendants' 12(b)(6) motion to dismiss, concluding that

the allegations were legally sufficient to reach the level of slander per se under North Carolina law. The court stated specifically: "Allegations that [the defendant corporation] is mismanaged, treats its employees and contractors unethically, and performs shoddy work can impugn [the defendant corporation's] corporate reputation by injuring its business goodwill." Ibid.

Applying the rationale of those holdings here, I conclude the Respondent's allegations concerning the discriminatees' Indeed.com posts are not baseless. The following statements are similar in kind to those in *Mason* and *Eli Research* and arguably impugn the Respondent's corporate reputation: "very poor management"; "abundance of hostility towards staff"; "supervising physician (also owner) allows office management to yell at providers"'; "the company goes thru staff like underwear"; "she [Cromer] is a terrible manager and so are the practices' owners"; "the management is completely unprofessional"; "the management has no idea what they are doing"; "no one has been there longer than 2-3 years…"; and "very hostile work environment." Collectively, these statements on their face claim, emphatically, that the Respondent is a poorly run company with owners and supervisors who are professionally incompetent and who mistreat their employees. The statements were posted on a job search website in a section for reviews of the Respondent's business. A North Carolina court could conclude that the statements denigrate the Respondent and its supervisors in their business relations, thereby impugning their corporate reputation. Therefore, they arguably are libel per se. See *Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990) (letter in which defendants accused plaintiff company of committing an unauthorized act was libel per se because it impeached the company in its trade); *Angel v. Ward*, 43 N.C.App. 288, 291, 258 S.E.2d 788, 790–791 (1979) (statements in letter complaining that IRS agent was unable to "grasp certain fundamental accounting practices," had a level of "expertise below what one should expect of an [IRS] agent," and had a general lack of professionalism compared to other agents was libel per se because it impeached the agent in her trade). Accordingly, the Respondent's allegations cannot be said to be baseless, as they raise a genuine state law legal question.

The General Counsel argues that the Respondent cannot reasonably expect to prevail on these allegations because the statements at issue are opinion or rhetorical hyperbole. Inexplicably, the General Counsel cites to *Mason* to support this argument. The trial court there found, to the contrary, that similar statements were fact, not opinion.

Moreover, in *Daniels v. Metro Magazine Holding Co., LLC*, 179 N.C.App. 533, 634 S.E.2d 586 (2006), the plaintiff, an agent of an insurance company, brought a defamation action against a claimant who wrote an article critical of the agent's handling of his claim. The article included statements that the agent's actions were the equivalent of the former Soviet security police; the agent spoke to him in a sinister and Gestapo voice; the agent wanted to take him to the gas chamber; and the agent was a fascist. The appellate court affirmed the trial court's dismissal of the plaintiff's claim for libel per se. The court found the statements to be pure opinion not capable of being proven or disproven or rhetorical hyperbole which no reasonable reader would belief. Here, the only statement in the discriminatees' Indeed.com posts which fits this category is the one stating that the "practice is [run] by a maniac" (referring to Cromer). In

contrast, the other statements discussed above arguably might be believed by a reasonable reader. The statements, most of which are conclusory, could be proven or disproven by specific examples of conduct by the Respondent's supervisors.

Beyond all this, the Respondent's lawsuit is at the pleadings stage. The only conclusion I reach at this stage is that the allegations concerning the Indeed.com posts on their face are not baseless. A North Carolina court ultimately may conclude on the merits of the complaint allegations that the statements constitute opinion, not fact. For now, whether they are is a genuine state-law legal question.

The Respondent's state court lawsuit allegations regarding the discriminatees' Indeed.com posts are not baseless. Accordingly, the Board must stay its hand pending completion of the state court proceedings regarding those social media posts. Thus, the allegations in the General Counsel's complaint concerning the Indeed.com posts are dismissed, but the Board will retain jurisdiction for further consideration upon prompt notification by any party of a final, binding determination or resolution of the merits by the State of North Carolina.[32]

D. The Breach of Contract Allegations

Finally, the Respondent's state court lawsuit alleges that the five discriminatees breached their employment agreements with the company. The General Counsel contends these allegations are baseless and retaliatory, thereby violating Section 8(a)(1) under *Bill Johnson's*.

Under North Carolina law, the essential elements for a breach of contract claim are the existence of a valid contract and a breach of the contract's terms. *Eli Research, Inc. v. United*

[32] This legal conclusion applies to state court lawsuit pars. 57, 58, 60, 71 and 96 (the last two only to the extent the claims rely upon the Indeed.com posts), corresponding to the General Counsel's complaint paragraphs 9(a), 9(b), 9(c), 9(i), and 9(n). The conspiracy to defame claim, to the extent it relies upon the Indeed.com posts, likewise is not baseless, because the Respondent has pled an unlawful act causing damage. See fn. 29 herein. I further note that the Respondent cannot rely in its lawsuit on the statement in the Indeed.com post that it had discharged five employees on the same day. As discussed above, that allegation is preempted because it is one of the issues Judge Goldman ruled upon in *Pain Relief Centers I*.

In contrast to the Indeed.com allegations, I find the Respondent's defamation allegations regarding the Facebook posts to be baseless. The comment "let's go girls" and nonspecific comments about unidentified individuals with poor character who are undeserving of respect are statements of opinion. No provable facts are included in the posts. The posts also make no reference to the plaintiffs. In North Carolina, proving libel per quod requires a showing that the written statement is understood by those to whom it is published to be defamatory against an individual. *Robinson v. Insurance Co.*, 273 N.C. 391, 159 S.E.2d 896 (1968). Because the posts do not identify about whom the statements were being made, no reasonable litigant could expect to succeed on the merits of this defamation allegation. I will address in the next section whether those allegations are retaliatory.

Communications Group, LLC, supra at 755 (citations omitted). A valid contract requires an agreement based on a meeting of the minds on all essential terms. *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001).

To demonstrate that it had an enforceable employment contract with Edwards, the Respondent relies upon the "Collaborative Practice Agreement" allegedly signed by Edwards and Hansen on July 23, 2018.[33] As previously discussed, this agreement described Edwards' job duties as a nurse practitioner. The Respondent itself acknowledges in the lawsuit that the agreement related "to her medical provider duties and responsibilities at PRC and with Dr. Hansen."[34] The agreement did not contain any essential terms regarding her employment, including, most notably, her salary and the length of her employment term. In North Carolina, the terms of employment contracts require sufficient certainty and specificity with regard to the nature of the services performed and the compensation to be paid. *Mayo v. North Carolina State University*, 168 N.C.App. 503, 508, 608 S.E.2d 116, 121, affd. 360 N.C. 52, 619 S.E.2d 502 (2005), citing *Humphrey v. Hill*, 55 N.C.App. 359, 361, 285 S.E.2d 293, 295 (1982). Compensation is an essential term for a contract to render services and the term "must be definite and certain or capable of being ascertained from the contract itself." Ibid. (citing *Howell v. C.M. Allen & Co.*, 8 N.C.App. 287, 289, 174 S.E.2d 55, 56 (1970)). Because the Collaborative Practice Agreement lacks essential terms, no reasonable litigant could expect to prevail on a breach of contract claim premised on the document being a valid contract.

As to the other four defendants, the Respondent's lawsuit alleges that they likewise breached their employment agreements, including by violating numerous provisions of its employee handbook. The Respondent does not plead what "employment agreements" are being referenced or what provisions in the employee handbook have been violated. It appears the contention is that the handbook itself is an employment agreement, but the lawsuit does not specifically allege that conclusion. Moreover, the Respondent did not introduce in this case any employment agreements for the other four discriminatees. It also did not introduce the referenced employee handbooks. And it did not elicit testimony concerning how the contracts were breached.

Because the Respondent has not properly pled all the elements of a breach of contract claim under North Carolina law and has not identified any evidence to support those claims, the breach of contract allegations are baseless.

I also conclude that the Respondent's lawsuit, including these breach of contract allegations, was retaliatory. As with discriminatory discharges under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), the timing of the Respondent's lawsuit

[33] R. Exh. 6. The lawsuit breach of contract allegations addressed here are not premised upon Edwards "Nurse Practitioner Employment Agreement," which Judge Goldman found did not exist in *Pain Relief Centers I*.

[34] GC Exh. 3, state court lawsuit par. 22.

alone is sufficient to establish a retaliatory motive. The Respondent filed the state court lawsuit less than 2 weeks after the General Counsel issued the complaint in *Pain Relief Centers I* alleging that the company unlawfully discharged the five discriminatees. Moreover, many of the lawsuit allegations were premised on the discriminatees having lied to the General Counsel during the investigation of the underlying ULP charges. Thus, the lawsuit was a direct attack on the discriminatees invoking the Board's processes and the General Counsel finding merit to their claims. Finally, the Respondent's document requests and interrogatories sought to obtain discovery of the General Counsel's ULP case through the state court lawsuit. The retaliatory motive here is more than obvious. *Bakery, Confectionary & Tobacco Workers' Intern. Union, Local 6 (Stroehmann Bakeries, Inc.)*, 320 NLRB 133, 140 fn. 12 (1995).

Accordingly, the Respondent violated Section 8(a)(1) by filing a lawsuit against the defendants with baseless breach of contract claims to retaliate against their protected activity.[35]

CONCLUSIONS OF LAW

1. The Respondent, Pain Relief Centers, P.A., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on September 1, 2020, by filing and pursuing claims in a state court lawsuit against Charging Party Krisandra Marie Edwards and employees Miranda Keener Cox, Yesenia Ramirez-Zavala, Erin Whitlock Stiltner, and Amber Whitlock that were preempted by federal law.

3. The Respondent violated Section 8(a)(1) of the Act on September 15, 2020, by issuing discovery requests to Edwards, Cox, Ramirez-Zavala, Stiltner, and Whitlock that were preempted by federal law.

4. The Respondent violated Section 8(a)(1) of the Act on September 1, 2020, by filing and pursuing claims in a state court lawsuit against Edwards, Cox, Ramirez-Zavala, Stiltner, and Whitlock that lacked a reasonable basis and were filed with a retaliatory motive.

[35] This legal conclusion applies to state court lawsuit pars. 85 and 97, corresponding to the General Counsel's complaint pars. 9(k) and 9(o). This legal conclusion also applies to the baseless allegations concerning the defendants' Facebook posts, which are contained in lawsuit par. 96, corresponding to the General Counsel's complaint par. 9(n). Given that the Respondent's breach of contract claims in this regard are baseless, the conspiracy to breach contracts claims likewise are baseless and retaliatory. See fn. 29. Having found that the lawsuit allegations contained in paragraphs 62, 63, 66, 73, 90, 92, and 96, corresponding to the General Counsel's complaint pars. 9(d), 9(e), 9(g), 9(j), 9(l), 9(m), and 9(n), are preempted, I decline to address whether they also were baseless and retaliatory under *Bill Johnson's Restaurants*, as alleged in the General Counsel's complaint.

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Respondent has not violated the Act in any of the other manners alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In particular, I shall order the Respondent to withdraw and, if necessary, otherwise seek to dismiss the preempted and baseless/retaliatory claims in the lawsuit docketed in the General Court of Justice, Superior Court Division, County of Catawba, State of North Carolina, as No. 20-CVS-2164, *Pain Relief Centers, P.A. et al. v. Krisandra Marie Edwards et al.*, including any amendments, refilings, and discovery requests. The state court lawsuit allegations which must be withdrawn or dismissed are paragraphs 62, 63, 64, 66, 70, 73, 85, 90, 92, 96, 97, and 98.

I also shall order the Respondent to reimburse Edwards, Cox, Ramirez-Zavala, Stiltner, and Whitlock for all legal and other expenses incurred in defending the unlawful state law claims, to date and in the future. Interest on that amount is to be paid at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The General Counsel requested that I order the special remedy of a notice reading. However, the General Counsel makes no legal argument as to why that remedy is warranted. I also find the traditional remedies sufficient to address the Respondent's unlawful conduct. Therefore, I decline to order a notice reading.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Pain Relief Centers, P.A., its officers, agents, successors, and assigns, shall

1. Cease and desist from

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Filing, maintaining, and prosecuting lawsuits with causes of action and discovery requests that are preempted by the Act;

(b) Filing, maintaining, and prosecuting lawsuits with causes of action that lacked a reasonable basis and were filed with a retaliatory motive;

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 7 days after service of this Decision an Order by the Region, if the Respondent has not already done so, withdraw and, if necessary, otherwise seek to dismiss the unlawful state law claims, including any amendments, refilings, and discovery requests, that were preempted or baseless and retaliatory, as identified in the remedy section of this decision, in the lawsuit docketed in the General Court of Justice, Superior Court Division, County of Catawba, State of North Carolina, as No. 20-CVS-2164, *Pain Relief Centers, P.A. et al. v. Krisandra Marie Edwards et al.*

(b) Reimburse Charging Party Krisandra Marie Edwards and employees Miranda Keener Cox, Yesenia Ramirez-Zavala, Erin Whitlock Stiltner, and Amber Whitlock for all legal and other expenses incurred in defending the unlawful state law claims identified in the remedy section of this decision, to date and in the future, in the manner set forth in the remedy section of this decision.

(c) Post at its facilities in Conover and Salisbury, North Carolina copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the

[37] If a facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., December 13, 2021.

Charles J. Muhl
Administrative Law Judge[38]

[38] The Respondent argues that NLRB administrative law judges, including me, are unconstitutional because we have "double for cause" protection from being removed from our positions. See *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010). In *Lucia* v. *SEC*, 585 U.S. ——, 138 S.Ct. 2044, 2052–2054 (2018), the Supreme Court declined to address this legal question. I likewise decline to do so, as the issue is one more appropriately left for the Board and/or federal courts to address in the first instance.

APPENDIX

NOTICE TO EMPLOYEES

Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT file, maintain, and prosecute a lawsuit against you with causes of actions and discovery requests that are preempted by federal labor law.

WE WILL NOT file, maintain, and prosecute a lawsuit against you with causes of action that lack a reasonable basis and are filed with a retaliatory motive.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and, if necessary, otherwise seek to dismiss the unlawful state law claims we filed, including any amendments, refilings, and discovery requests, against Krisandra Marie Edwards, Miranda Keener Cox, Yesenia Ramirez-Zavala, Erin Whitlock Stiltner, and Amber Whitlock that were preempted or baseless and retaliatory, in the lawsuit docketed in the General Court of Justice, Superior Court Division, County of Catawba, State of North Carolina, as No. 20-CVS-2164, *Pain Relief Centers, P.A. et al. v. Krisandra Marie Edwards et al.*

WE WILL reimburse Edwards, Cox, Ramirez-Zavala, Stiltner, and Whitlock, with interest, for all legal and other expenses incurred, to date and in the future, in defending the unlawful state law claims in the lawsuit described above.

PAIN RELIEF CENTERS, P.A.
(Respondent)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Harris Tower, 233 Peachtree Street N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-266324 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (205) 518-7517.